POLICE DEPARTMENT CITY OF NEW YORK

June 16, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Michael Birch
Tax Registry No. 925053
79 Precinct
Disciplinary Case Nos. 2014-11252 & 2014-12721

Charges and Specifications:

Disciplinary Case No. 2014-11252

1. Police Officer Michael Birch, while on duty and assigned to Transit District 34, on September 26, 2012, [redacted], did wrongfully and without just cause prevent or interfere with an official Department investigation, to wit: Police Officer Birch failed to fully cooperate with investigators from Transit District 34 when he was questioned about unauthorized notebooks, not related to official Department business, that were discovered inside the [redacted] members of the Department. (*As amended*)

   P.G. 203-10, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

2. Police Officer Michael Birch, while on duty and assigned to Transit District 34, on August 17, 2012 to August 31, 2012, at the York Street Subway Station, Kings County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: Police Officer Birch wrote entries in an unauthorized notebook, not related to official Department business, that were discovered inside the [redacted] by members of the Department. (*As amended*)

   P.G. 203-10, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

Disciplinary Case No. 2014-12721

1. Said Police Officer Michael Birch, while on-duty and assigned to the 69th Precinct, on or about September 15, 2014, having responded to a report of a domestic incident and having been informed by the complainant of the possible existence of an Order of Protection, wrongfully failed to verify the existence of a valid Order of Protection. (*As amended*)

   P.G. 208-36, Pages 3-4, Paragraphs 3 & 6 – FAMILY OFFENSE/DOMESTIC VIOLENCE

2. Said Police Officer Michael Birch, while on-duty and assigned to the 69th Precinct, on or about September 15, 2014, having responded to a report of a domestic incident and

engaging in an interaction with the alleged offender outside of the incident location, wrongfully failed to take police action by seeking further information from the alleged offender/witness or by effecting an arrest of the offender. (*As amended*)

P.G. 208-36, Page 3, Paragraph 2(C) – FAMILY OFFENSE/DOMESTIC VIOLENCE
P.G. 208-36, Page 5, Paragraphs 4 & 7

3. Said Police Officer Michael Birch, while on-duty and assigned to the 69th Precinct, on or about September 15, 2014, having responded to a report of a domestic incident, wrongfully transmitted an incorrect disposition to the radio dispatcher upon leaving the scene of said domestic incident. (*As amended*)

P.G. 202-23, Page 1, Paragraph 7 – RADIO MOTOR PATROL RECORDER
P.G. 203-05, Page 1, Paragraph 4 – PERFORMANCE ON DUTY – GENERAL

4. Said Police Officer Michael Birch, while on-duty and assigned to the 69th Precinct, on or about October 22, 2014, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer Birch during an official Department interview made one or more misleading statements concerning an interaction he had on September 15, 2014, with the alleged offender in a reported domestic incident to which said Police Officer Birch had responded. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – CONDUCT PREJUDICIAL

Appearances:

For the Department: Joshua Kleiman, Esq.
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For the Respondent: Eric Sanders, Esq.
The Sanders Firm PC
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Hearing Dates:
February 22 and 24, March 1 and 18, 2016

Decision:
Guilty

Trial Commissioner:
ADCT David S. Weisel

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on February 22 and 24, and March 1 and 18, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Sergeants Alexander Crouch and Angelica Torres-Pintos, Police Officer Johnathon Waage, Person A, Person B and Person C as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

Case No. 2014-11252

It is undisputed that on August 17, 2012, officers from the Transit Bureau Investigations Unit (TBIU) confiscated a notebook entitled "Thoughts from York, Version 3.0" (Dept.'s Ex. 1) from an officer posted at the [redacted] subway station in Brooklyn, located within Transit District 34. [redacted] are a counterterrorism measure located in stations at either end of a river tunnel. They are staffed by a single officer for four hours at a time. The officer is posted within the booth and must watch for suspicious activity (Tr. 3-4, 19-21).

Crouch reviewed the notebook's contents. He found references to raping, torturing and killing a female supervisor, referred to in the book as "Bon Jovi." This person later was identified as [redacted] The notebook thereafter was turned over to the Internal Affairs Bureau (Tr. 20-21, 25, 29-30, 357).

On August 31, 2012, Crouch again conducted an inspection of the [redacted]. On that date, he observed a second officer inside the [redacted] with a marble notebook. As Crouch approached, the officer appeared to remove two pages from the book, which were not subsequently located. That notebook entitled, "[redacted]" (Dept. Ex. 2) also was confiscated. The first page of the book contained a letter to TBIU in response to the confiscation of the prior book (Tr. 25-26).

Crouch interviewed a large majority of the officers assigned to TD 34 regarding the notebooks. He estimated that he conducted over fifty official Department interviews and that over thirty officers were disciplined in connection with these notebooks. He stated that many interviewees acknowledged that [redacted] was a nickname for [redacted]. Crouch recalled, though, that while Respondent was cooperative with "certain points" of his interview, he was "evasive" regarding certain questions, particularly as to other officers who were referred to in the notebooks by nickname, including the [redacted] reference (Tr. 30-31, 36-37, 41-42).

The issue at trial is whether Respondent fully cooperated with investigators during the interview. The Department alleged that he gave vague, misleading answers and used his voice in such a way as to obscure what the notebooks actually said. A second issue is whether it was a violation of the good-order provision of the Patrol Guide to write in the notebooks while on duty, as they were an unauthorized article to have within the [redacted] (Tr. 21).

Crouch testified that Respondent confirmed making entries in the notebooks during official Department interviews in which he identified pages that contained his handwriting by placing post-it notes with his name on those pages. The racially and sexually offensive comments in the notebooks were not actually written by Respondent, although he responded to at least one of them (Tr. 32-33, 50-51; Dept. Exs. 3a-b, marked Version 3.0 & 4.0, respectively; Ex. 4a, transcript of official interview). Post-it notes indicating entries made by Respondent appear

on pages 6, 9, 11, 26-27, 30, 32, 37, 78-81, 90 and 94-97 of Version 3.0, and pages 3-4 and 9-10 of Version 4.0.

At his September 26, 2012, official Department interview, Respondent stated that he did not know who started the book. During the interview, Respondent was asked by Crouch and other investigators to read several entries aloud and was prompted multiple times not to drop or slur his voice and to read "like an adult." When asked to read aloud from the notebooks, he did not audibly read the terms [redacted]" and [redacted]," and when asked about his own use of the term [redacted]," he could not recall to whom he was referring. He also stated, even when warned about the seriousness of making false statements, that he did not know who other officers referred to as [redacted] "[redacted]" "[redacted] or [redacted] were because he "didn't care" what others were writing.

Shortly after denying knowledge of who [redacted] referred to, Respondent was prompted to read an entry (Version 3.0, p. 80) where he had made reference to [redacted] brag[g]ing to another supervisor . . . about how she will hammer people into working harder . . . ." Respondent was again asked whom [redacted]" referred to and said he believed it was [redacted] When asked why minutes before he said he did not know who [redacted] was, Respondent stated: "I forgot. I honestly forgot. . . . This is like, this is the second time hearing about [redacted]. . . . It wasn't something that – I never talked about the supervisor." As he continued reading his own [redacted] entry, Respondent again was directed to stop slurring his words.

As to Version 4.0, Respondent agreed that he also made entries in that book. He again denied knowing who [redacted]" or [redacted]" referred to, but denied that they were references to him. He also acknowledged writing [redacted] going down in a blaze of glory," but asserted it merely was a reference to the band [redacted] and not [redacted]s "because I didn't know who this

was." Finally, he stated that he had "no idea" who started the book but then suggested the first entry might have been written by Police Officer Eugene Durante (Durante was charged for his role in the notebooks under *Case No. 2014-11298* [Mar. 22, 2016]). Respondent agreed, though, that he wrote in Version 4.0, "Thanks for the new book Rubba," and identified Rubba as Durante. Respondent explained that he did not want to "throw [Durante] under the bus" because he was not certain he had started the book. Respondent was modified immediately following this interview (Dept. Ex. 4a, transcript, pp. 9, 29-37, 44-49, 69-70).

At trial, Respondent asserted that he gave investigators all the information he was aware of at the time and cooperated fully at his Department interview. He stated that he was asked to identify the handwriting of other officers in the book but was unable to do so in certain instances. He further denied "playing games" with the investigators about not knowing who initiated the books. Respondent explained that the first entry in Version 4.0 was signed with a smiley face, which Durante had been known to do, so Respondent believed he might have started the book. Still, Respondent reiterated that because he did not know for certain Durante initiated the book, he felt he did not have "enough" to accuse him or "hurt [Durante's] credibility" with the investigators. Respondent also asserted, when asked why he had to be admonished for not reading the entries to the investigators in a professional manner, that he was distraught during the interview and that it was difficult to "reconstruct everything that's written" (Tr. 264, 269-71).

Respondent acknowledged making entries in the book, including an entry where he criticized [redacted] supervisory methods, referring to her as [redacted]. He suggested that he had seen references to "a character called [redacted]" in the book previously and came to understand this to refer to [redacted] though he could not explain why he came to this conclusion. He disagreed, however, that it was common knowledge in TD 34 that [redacted] was a nickname for [redacted] (Tr. 280-81).

Respondent asserted that he initially told investigators that he did not know who [redacted] was because "they asked me who was the book and everybody else referring to her as, so I don't know. . . . [T]hey gave me a bunch of papers like this to go through the notebook." He noted that after he was given his own entry to read, he recalled that [redacted] referred to [redacted] and clarified that to the investigators. He also agreed that he told the investigators the interview was only the second time he had heard [redacted] referred to as [redacted], but acknowledged on cross examination that there were two instances where he wrote the words [redacted] in the books. He also admitted on cross that he wrote, "Big Papa: Got it. [redacted] going down in a [redacted] in reference to [redacted]. On re-direct, however, he stated that he was making reference to the song [redacted]" by [redacted]. Respondent then asserted on re-cross that when he made this entry, he did not know [redacted] was a nickname for [redacted]. When asked, however, how that was possible when ten pages earlier he had made a reference to [redacted] that he acknowledged was a reference to [redacted], Respondent claimed he "didn't know the order of the book and the time I wrote it. . . . I don't know . . . if the pages were moved. . . . I don't recall if this was written first or that was written first" (Tr. 282-85, 340-49).

Additionally, Respondent asserted, for the first time at trial, that he would take the notebook with him and make entries while off duty because "I didn't want to break any Department policy to be on duty writing anything." He suggested the book "was never in that booth in any consistent time." Respondent pointed out that he was not specifically asked during the interview whether he made the entries from home. Respondent explained that he would work in the Omega booth for four hours prior to his assigned tour and then do his regular patrol on the trains. He contended that he would take the book with him or leave it with one of the MTA clerks and pick it up following his tour to take home with him (Tr. 234. 256, 287-90).

Respondent agreed that in one particular entry, he apologized that the book might have gotten dirt on it while he was fixing the air conditioning unit in the booth. This would suggest that he was writing in the book while inside the booth, on duty. He suggested instead that the book was sitting open in the booth while he was working on the air conditioner. "Why did I have the book open? I just took it out the drawer and it just so happened to be open," to the next blank page. He made the actual entry about fixing the unit when he got home and noticed dirt on the book (Tr. 313-14).

Specification No. 1: Failing to Cooperate Fully With Investigators

It is apparent from the transcript of Respondent's official Department interview that Respondent did not fully cooperate with investigators. Most of the notebooks consisted of juvenile, disgusting nonsense that any member of the New York City Police Department should have been embarrassed to participate in. But one part of the book was a list of purportedly proposed ways to "deal with" [redacted]" who from context was a female supervisor at TD 34. Parts of the list were violently misogynistic threats of sexual assault and torture. This was way more serious than simply using an unauthorized notebook to memorialize one's mental detritus in an effort to cure the boredom of sitting in a box for four hours. It was vital for investigators to identify who the supervisor was.

Respondent, however, was evasive about having any knowledge of who [redacted] was. This was until he was confronted later in the interview with his own entries regarding [redacted] which in context indicated she was a female supervisor and assigned to his command. The particular one with which the investigators confronted him was in response to [redacted]," who asked for Respondent's assistance "to prevent any and all out going calls for help after [redacted] gets body slammed! We wouldn't want her getting any medical help now would we? At least not too soon anyway..." Respondent answered, "Big Papa, got it. [redacted] going down in a

blaze of glory" (Version 3.0, p. 90). He contended in the interview that he "referred to the music at the time because I didn't know who this was" (Dept. Ex. 4a, p. 70).

It is undisputed that [redacted] recorded a well-known song called [redacted]" The problem with Respondent's argument is he did not simply "refer to" the song, he referred to it in order to let [redacted] know that Respondent understood exactly what [redacted] was talking about. Therefore, Respondent's answer at trial was not fully cooperative. In any event, Respondent also was confronted at the interview with a passage where he was criticizing [redacted] for "bragging" to "another supervisor" about something that "she," [redacted], had done. This also indicated Respondent's knowledge of exactly who [redacted] was. Furthermore, Respondent claimed he did not know who started the Version 4.0 notebook, then admitted it was Durante. Respondent simply did not want to implicate another officer. He was shielding Durante's misconduct.

In addition to these efforts not to link himself to the books' more controversial entries, Respondent also had to be chided multiple times during the interview to read both professionally and audibly, even being directed to "read like an adult." Specifically, Respondent seemed to whisper or pretend to be unable to discern words and phrases that would cast a negative light. He also had to be warned more than once about the seriousness of making false statements. Despite these admonishments from superior officers, Respondent did not fully cooperate with the investigators by sharing all he knew, and refused to take a professional approach to the interview process. Accordingly, he is found Guilty of the misconduct set forth in Specification No. 1.

Specification No. 2: Making Entries in Unauthorized Notebooks

Respondent admitted to writing entries in the notebooks "Thoughts from York" Versions 3.0 and 4.0. It is not controverted that these notebooks were unauthorized and unrelated to official Department business. Accordingly, he is Guilty of Specification No. 2.

Respondent raised several other defenses to this specification. Respondent asserted that he had a First Amendment right to express his "workplace gripes," particularly as to alleged arrest or summons quotas imposed by supervisors. The problem with this is that Respondent is not being disciplined for the contents of the notebooks. He is being disciplined for writing in these indisputably unauthorized books, while on duty and assigned to a post in which he was supposed to be looking for possible terrorist activity. The purpose of the rule against unauthorized articles in the [redacted] specifically is that officers will not be distracted from monitoring the station, trains and tunnels.

Furthermore, approximately thirty officers from TD 34 were interviewed and subsequently disciplined for writing in these unauthorized books. The books were discovered by TBIU personnel, not TD 34 supervisors. This severely undercuts Respondent's assertion that he is being illegally targeted as a whistleblower for speaking out against alleged quotas. Although Respondent asserted that he complained to various TD 34 supervisors about this subject, there was no evidence that any of these supervisors had anything to do with the genesis or conduct of the notebooks investigation. In fact, Respondent admitted at trial, "I'm not saying that that had anything to do with my case" (Tr. 228-32, 234-35, 238-41).

Respondent testified that he never made entries while working in the [redacted] raising this contention for the first time at trial but allegedly defeating the specification, which reads "while on duty." This is incredible. The titles of both notebooks, [redacted]ork," is a sign that the books were filled with an officer's thoughts memorialized from the [redacted] Respondent's claims that he would work in the [redacted] for four hours before his regular tour, then either take the book with him on patrol of the subways or leave them in an MTA clerk's booth, and then bring them home to Staten Island to make entries, is just laughable.

In any event, some of Respondent's entries strongly suggest that they were written in the booth. On one occasion, he apologized for getting dirt on the book while cleaning the air conditioning unit in the booth. On another, he implored, "Don't take this literary masterpiece out of this booth" (Dept. Ex. 1a, pp. 11, 96). Also undercutting Respondent's assertion that his entries were made outside the booth is his interview statement that "[i]t wasn't something that went back to the command and talked about. I wrote my thoughts down. I put it in a drawer. Whoever read it, read it" (Dept. Ex. 4a, p. 34). Thus, the Department proved that Respondent made entries while on duty. The mere possibility that his tour schedule could have allowed him to take the books home does not defeat this conclusion.

Case No. 2014-12721

It was undisputed that September 15, 2014, at approximately 2310 hours, Respondent, now transferred out of Transit to the 69 Precinct, and his partner, Police Officer Johnathon Waage, were assigned in a vehicle to respond to a call about a family dispute at a residence. Respondent was the vehicle operator and Waage was the recorder. At random, members of the Domestic Violence Investigations Unit (DVIU) also responded to the location to observe at a distance and verify that proper procedure was followed in handling the job. Respondent and Waage spoke to the complainant, Person A, and her adult daughter, Person B, about a dispute with Person A's purportedly common-law husband, Person C. Thirty minutes later, they left the location and Waage finalized the job over the radio as a 10-90F1, no offense reported but DIR prepared. Waage completed the domestic incident and complaint reports, classifying the incident as harassment (see Dept. Exs. 5 & 6, scratch and Omniform copies of DIR; Ex. 8a, complaint report).

Moments later, DVIU officers approached Person C at the front of the home and then entered the residence and spoke with Person A and Person B. After speaking with

the individuals involved and reviewing documents provided by Person A, Person C was arrested for violating an order of protection. DVIU officers subsequently determined that Respondent erred in (i) failing to verify the existence of a valid order of protection, (ii) failing to take police action by seeking further information from or by effecting an arrest of Person C, and (iii) transmitting an incorrect disposition to the radio dispatcher upon leaving the incident scene.

Sergeant Angelica Torres-Pintos of DVIU stated that upon arriving at the location, she remained in her vehicle until she saw Respondent and Waage exit the residence. As they were leaving, she saw a male engage the officers in conversation. While she observed at that point, Torres-Pintos did not know the identities of either officer or who was acting as recorder or operator (Tr. 73, 75-76, 98, 103-04, 120).

After Respondent and Waage left the location, Torres-Pintos approached the residence, where a male and female were sitting on the stoop, identified herself, and asked the male for identification. He identified himself as Person C and explained that his wife had called the police while they were arguing and that she often made up "crazy things" about him. Torres-Pintos entered the home and spoke with Person A, who confirmed that she had an argument with Person C where she alleged he had threatened to burn her face and burn down the house. Person A told Torres-Pintos that she had recounted these threats to the two officers that responded earlier. Torres-Pintos read the DIR, which referenced an order of protection, and asked Person A to produce this order. Person A handed her two documents and because the expiration date was unclear, Torres-Pintos called the local precinct and an officer, using the docket number, verified that the order of protection was valid. Torres-Pintos believed these were the same two documents that Person A had showed Respondent (Tr. 74-75, 103-09).

Having confirmed an order of protection was in place that allowed Person C to reside at the location provided he not harass or annoy Person A (limited OOP), Torres-Pintos informed

Person C he was under arrest. She asserted that he accused her of bias because the male officers that were there previously had "let him go," telling him only that he had to leave due to the order of protection. Person B also confirmed to Torres-Pintos that one of the male officers had told her father he could not be at the home because of the order of protection (Tr. 75-77, 120).

When Torres-Pintos interviewed Respondent regarding this incident, he initially denied that Person C ever was present at the scene. Only after being informed that Torres-Pintos was observing at the residence did Respondent note that a man had approached as he was leaving the location, but Respondent believed him to be a nosy neighbor. Conversely, Waage confirmed to her that they were indeed approached by Person C (Tr. 90-91).

Torres-Pintos acquiesced that all tasks regarding the paperwork and the radio would have fallen to the recorder and that the operator only was responsible for operating the vehicle. Nevertheless, she said, both responding officers are required to conduct an investigation when responding to a call, and Patrol Guide § 208-36, covering Family Offenses/Domestic Violence, makes no distinctions between recorders and operators. Notably, if the recorder transmitted the wrong radio code, it is the operator's obligation to inform and correct (Tr. 99, 114-18).

Waage testified that upon arrival, he and Respondent were let in to the residence by Person A and her daughter, and were informed that Person C had threatened that he would burn down the house. He did not recall her saying anything about the husband being in the garage. Based off these statements, Waage began taking a DIR and a complaint report. After Waage asked about orders of protection, Person A briefly walked away and then returned and showed "several" pieces of paper to Respondent, who then informed Waage that they were "past orders of protection" that were no longer in effect. Waage testified that Respondent simply looked at the documents and did not make any additional efforts to verify their validity. Waage did not remember Person A saying anything about needing to go back to court to get an updated

order. Explaining that he had wanted to indicate in his report that there had been past orders of protection, Waage noted "yes" in the order of protection field of the DIR, and further noted that Person A "provided order [of] protection at scene." He did not, however, indicate that the order had been violated (Tr. 134-38, 142, 157, 160).

Waage explained that he wrote in the DIR Person C was not at the location because that was true at the time he began writing the report. He agreed that a male, later determined to have been Person C, appeared on the sidewalk at the front of the house as they were exiting. Person C veered toward the vehicle and Respondent briefly spoke to Person C. Waage was unaware of what was said because he still was approximately fifteen feet away. Waage agreed that he was expected to search the immediate vicinity for the offender in a domestic violence situation, so he should have verified the male's identity, as he was a black male in the age range Person A had described. When Respondent returned to the vehicle, however, he told Waage that the man was incoherent and mumbling and might be a neighbor. Upon leaving the residence, Waage gave a no-offense-reported radio disposition, but indicated that even based on how they substantively finalized the matter, the radio code should have been a 93F, complaint report prepared for a family offense (Tr. 139-41, 152-53, 159-60).

The family involved in the incident also testified. Person A testified that she called the police because Person C threatened he was going to "cut my head off and burn the house down." This occurred in the house, not the garage. According to Person A, Person C was not near the garage. He left the house prior to the officers arriving (Tr. 162-64, 171).

When Respondent and Waage arrived, Person A recalled, she repeated Person C threat and the officers asked her about an order of protection. She responded affirmatively and looked for it, but had multiple documents dating back to 2007 and perhaps was "giving the wrong one, the wrong dates." As the officers were leaving, she could see Person C outside

on the patio from the hallway but said that the officers prevented him from coming inside. She agreed that she did not tell the officers the man was Person C, but neither was she was asked by the officers to identify him (Tr. 164-67, 171-74, 176-77).

Person A further recounted that female officers, i.e. the DVIU officers, arrived shortly thereafter and again asked her about the order of protection, which Person A said she initially could not find. She testified. however, that she ultimately located the then-valid order from 2014, and one of the female officers arrested Person C (Tr. 167, 172).

Person B testified that her mother woke her up, seeking her assistance in looking for the order of protection and speaking to the officers. She did not recall exactly what her mother said but remembered hearing that her father had threatened to burn the house down. As the officers were leaving, she observed her father outside the front of the house speaking to them and then went outside herself. She recalled that the officers told her father about the order of protection "and how he wasn't supposed to be there." Person B believed that she might have told the officers the man was her father (Tr. 182 85, 188, 191, 195-97).

Person C also testified. He recalled that Person A came home and they got into an argument over his car being in the driveway and one of them blocking the other in. "[T]he next thing I know," she had called the police. He moved his car down the street and then walked for about twenty minutes. When he returned to the house, he saw two male officers in their car and approached the vehicle's window to explain that he was not at fault. He was told by one, however, that he "shouldn't be in the house" because Person A had an order of protection against him. He recounted that after those officers left, he sat outside with his daughter when two female officers approached. He denied Torres-Pintos's contention that he accused of her being gender-biased (Tr. 205-07, 212, 214-15).

Respondent's account differs from those of all other witnesses in significant ways. In contrast to Waage who did not recall anyt hing about Person C allegedly being in the garage, Respondent testified that Person A stated that Person C had been in the garage when she heard a loud crash and him saying that he was going to burn the house down. He recalled Waage asking about orders of protection and alleged that Person A told him, "I had one in the past but I'm not sure if it's still valid." Respondent examined two documents she handed him and noted that one was a "temporary" order that was over a year old. He remembered asking Person A if she had followed up with the court and obtained another order. He claimed that she did not recall and said, "This is all I have." According to Respondent, she also asked for a copy of the DIR so that she could go to court and get a new order. As such, Respondent did not believe there was a valid order of protection, though he directed Waage to note in the DIR that there were expired orders. He pleaded that this was his first time dealing with an order of protection, but conceded he previously had prepared eleven DIRs (Tr. 245-48, 315, 320-21).

After taking the report, Respondent recounted that Person A's daughter began walking them out when a male with a "thick accent" approached on the sidewalk, wanting to know what was going on in the house. The daughter did not engage with this individual. Respondent testified that he could not understand him and thought he either was a nosy neighbor or simply a crazy person. He could not remember what he said but quickly "dismissed" the man, suggesting that he might have told him it was none of his business. Respondent testified that the man then approached the police vehicle and spoke to Waage through the window (Tr. 249-51, 332, 339, 353).

Respondent agreed that he did not take steps to verify whether a current order of protection existed because Person A had given him two outdated documents, which he "couldn't make heads or tails of," and that she told him she believed they were over a year old and no

longer valid. This convinced him that she did not have a currently valid order of protection. He acquiesced, however, that at his official Department interview on this subject, he stated that Person A told him, "I think so" when asked if she had an order of protection "now." Respondent insisted, however, that the outdated, temporary order was "the clue" that Person A did not have a valid order (Tr. 315-18, 351-52; Dept. Ex. 9b, p. 5)

As to his interaction with the male who was later determined to be Person C, Respondent explained that he did not stop him because "[a]ny violation that's not observed in your presence you have no right to stop that person." He opined that he did not even believe there had been a violation as Person A had not indicated that Person C threatened her in the house or that there was direct contact between her and Person C. As such, Respondent testified that he did not have the right to ask the man whether he was Person C, as it was, at most, "a verbal dispute." He further contended that he had told Person B to point out her father but she did not do so and acted nonchalantly when he approached (Tr. 323-24, 326 27, 331).

As to Person B saying she heard an officer tell her father that he could not be at the residence due to the order of protection, Respondent stated he did not hear this but thought Waage might have said this as Respondent was getting into the car. He claimed that there was loud music on when he first turned the car on so he could have missed what Waage said to Person C. Respondent asserted, though, that Person B's statement that this conversation took place on the front patio was a lie. Respondent further alleged that Waage was lying when he said Respondent spoke with Person B while Waage headed to the vehicle (Tr. 335, 339-40).

Respondent agreed that when responding to any domestic call, there is a duty to search the immediate vicinity for the offender. While he agreed that he did not do so, he suggested there was no duty in this situation because "I had nothing to investigate . . . no clothing description." He further contended that it only was the responsibility of the recorder, Waage, to

conduct the investigation and examine all pertinent facts. He also suggested that Waage was insulted when he tried to assist him on the paperwork (Tr. 329-30, 350, 359).

Finally, Respondent was confronted on cross examination with certain statements he made at his Department interview. He admitted that he initially said "no" at his interview when asked if Person C was present at the scene. Only when he was informed the investigator conducting the interview was present at the residence, and was warned about the seriousness of making false statements, did Respondent state that there was a male at the scene, suggesting he did not think to question him regarding his identity because he had not been in a situation like that before when he was in Transit. He also stated at his interview, in contrast to his trial testimony, that Waage and Person C had not spoken. Respondent contended at trial that he thought the investigator only was referring to the initial interaction at the front of the house (Tr. 322, 329; DX 9b. p. 13, 17-19).

Specification Nos. 1 and 2

The first two specifications, respectively, charge Respondent with failing to verify the existence of a valid order of protection, and failing to take police action against Person C. Patrol Guide § 208-36 requires that when a complainant indicates that an order of protection has been obtained, the officer is to request she produce the order. If the order cannot be produced, an officer must use the Central Records Division, online or by phone, to search for the order. Even if the Central Records Division indicates that there are no orders of protection on file, the officer must telephone the precinct of occurrence or Communications Section and request that the FINEST System be searched.

It was uncontested that Person A could not produce the then-current order of protection for Respondent and Waage. Respondent's contention that her production of past orders was somehow an indication that there was no current order turns the Patrol Guide procedure on its

head. His claim that there were no clear dates on the documents (Tr. 352) is a typical dodge and not credible. In any event, Respondent indicated that he believed they could have been from 2013 or 2014. As the incident took place in 2014, these documents were hardly ancient and even if Respondent thought that they were expired, the proper course of action under the Patrol Guide would have been to take the extra steps to verify if an order was currently in place.

Respondent's contention that Person A told him she had to go back to court to get another order of protection, hereby providing him with an additional "clue" that she did not have a current order, also does not absolve him of misconduct. The Court has serious doubts about the credibility of this assertion. Waage did not recall Person A making any such statement. Person A was firm in her testimony that she had a valid order and was simply having trouble locating it. It is highly dubious that she would have expressed to Respondent that the opposite was true. In any event, orders of protection often are temporary in nature, running from court date to court date. The one in question here (Dept. Ex. 7) was one such temporary order. If Person A did say that she had to go back to court, a reasonable police officer should have known that she simply needed to keep the order updated. Though he took no responsibility at trial for failing to take this investigative step, Respondent acknowledged his error in his official interview, where he stated, "I don't deny that I failed to investigate it" (Dept. Ex. 9b, p. 11). The onus was on the officers, not the complainant, to verify that there was an order of protection.

Finally, the Court rejects Respondent's argument that he was under no obligation to check for an order of protection because he was merely the vehicle operator, and investigating crimes is the responsibility of the recorder. There is no such rule, anywhere. More specifically, Patrol Guide § 208-36 makes no distinction between an operator and a recorder. It is a procedure that is to be followed "when members of the service respond to, or are notified of, any incident involving members of the same Family/Household," p. 3.

As to Specification No. 2, Respondent was obligated at the very least to ask the man standing near the front of the home who he was. Patrol Guide § 208-36 requires that an officer conduct a search of the immediate vicinity for the offender when probable cause exists that an order of protection has been violated or a separate crime has been committed, and the officer "has reason to believe that such search might yield positive results" (pp. 4-5). Here, Respondent was informed by Person A that she was threatened, and there was certainly reason to believe an order of protection could have been violated, which Respondent would have confirmed if he had taken the steps outlined above.

Moreover, conducting a search was unnecessary here because the offender literally walked right up to the officers. Person A had informed them that Person C was a black male of a certain age. Respondent's assertion that he did not believe he had legal authority to even ask who Person C was or what he was doing on or near the property is patently incorrect. The authority to do so falls under a request for information, the first level of street encounters under People v. De Bour, 40 N.Y.2d 210 (1976). See People v. Hollman, 79 N.Y.2d 181, 190 (1992) ("[P]olice officers have fairly broad authority to approach individuals and ask questions relating to identity or destination, provided that the officers do not act on whim or caprice and have an articulable reason not necessarily related to criminality for making the approach."). To not even ask for identification when a person matching that description appeared literally right outside the home flies completely in the face of the Patrol Guide provisions designed to ensure complainants are protected from offenders.

This tribunal also rejects Respondent's contention that he lacked specialized training on how to handle domestic violence jobs. All officers are trained to respond to crimes and officers cannot claim ignorance of the Patrol Guide. This incident involved basic knowledge. In any event, Respondent agreed that he had prepared eleven DIRs during the mere seven months he

had been assigned to the 69 Precinct, following his prior tenure only in the Transit Bureau (Tr. 320).

Specification No. 3

Respondent was in the police vehicle when Waage put the job over the radio as a 90F1, indicating no domestic violence offense had been reported but a DIR was prepared. The tribunal credits the testimony of Person A, who stated that she told the responding officers Person C had threatened to burn the house down and physically harm her, and the testimony of the investigator, Pintos-Torres, who recounted Person A reporting the same to her just moments after Respondent had left. Waage did not share in Respondent's recollection that Person A said Person C was in the garage and that the two never had direct contact, so there could be no charge of harassment. Person C himself gave no testimony about being in the garage. As such, the credible evidence indicates that Respondent knew an offense was reported, even if he, at the time, believed it to be only harassment and not an order of protection violation. Even that is highly questionable given Person B's and Person C's testimony that an officer told her father to leave because of the order. Respondent could not have truly thought that no offense had been reported.

As the recorder, Waage was responsible for the errant classification. Here, however, Respondent also was responsible, as the record reflects that he helped cause the misclassification by collusion, intentional actions or negligence. See *Case No. 2012-8139*, p. 3 (Mar. 27. 2015). Respondent admitted that he told Waage to put down in the DIR that there were prior orders of protection. This indicates that Respondent advocated for his erroneous view that there was no currently valid order. The record also reflects that Respondent dismissed Person C when he appeared at the residence. This further indicates that Respondent was attempting to make the incident go away. Under the circumstances, therefore, Respondent helped make the

misclassification and is responsible for it as well. Cf. *-8139*, pp. 3-6 (accused officer had no role and was not asked for input on his partner's completion of complaint report and classification of the incident; determination of whether operator is responsible for recorder's action is to be made on case-by-case basis). Therefore Respondent is found Guilty of Specification No. 3.

Specification No. 4

The fourth specification charges Respondent with making misleading statements during his official Department interview surrounding the domestic incident. The Court finds that he did. When asked if Person C was present on the scene, Respondent denied seeing him. When informed that Pintos-Torres was at the scene making observations and that false statements could lead to termination, Respondent admitted there was a person at the scene who "never identified himself to me" (p. 13). Though Respondent suggested at trial that Waage interacted with Person C, Respondent specifically denied this during the interview. Respondent's current explanation that he believed the interview question was limited to interactions at the front of the house and not the vehicle lacks any ring of truth. Respondent's statements show a calculated effort to downplay and mislead regarding his failure to act. Accordingly, he is Guilty of Specification No. 4.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on March 10, 2000. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department seeks a penalty of 40 vacation days and placement on one year of dismissal probation. The Department emphasized that this heavy penalty is sought because of

Respondent's refusal to provide straightforward and truthful answers in two Department interviews (Tr. 412-13).

The other offenses –making entries in the notebooks, failure to verify the order of protection, wrong radio code and failure to discern additional information from Person C – would likely result in a lesser penalty. See *Case No. 2012-7857 & -8151. & 2014-11298* (Mar. 22, 2016) (18-year police officer forfeited 5 suspension days already served for making entries in Thoughts from York notebooks); *Case No. 2014-11891* (May 1, 2015) (11-year sergeant forfeited 10 vacation days for failing to conduct a proper investigation at the scene of a domestic violence call by failing to interview a key witness and determine if a physical altercation occurred, and failing to complete activity log entries regarding the incident). Indeed, Waage received a penalty of 10 vacation days for his misconduct. See *Case No. 2014-12720* (Jan. 22, 2016).

In Respondent's two cases, however, this Court agrees that Respondent engaged in flagrant displays of untruthfulness both during his interviews and at trial where he altered his version of events in significant ways. Respondent demonstrated that he lacks a sense of the gravity of making false statements and how that undermines the investigatory process.

Department precedent supports the imposition of the forfeiture of a significant number of vacation days along with dismissal probation. See *Case No. 2013-10370* (Jan. 29, 2015) (nine-year police officer received penalty of 10 vacation days, 30 pre-trial suspension days, and one-year dismissal probation for relatively minor misconduct of failing to remain on post until properly relieved, making improper entries in [redacted] post log, facial hair, and failing to maintain activity log, but compounded by false and misleading statements during official Department interview and refusing to clarify and answer questions during interview); *Case No. 2010-2270* (Feb. 8, 2013) (19-year officer forfeited 30 vacation days, 30 suspension days, and was placed on

one-year dismissal probation for refusing to cooperate with Port Authority Police Department investigation, and impeding an NYPD investigation, by providing vague and non-responsive answers to certain questions posed to him at his official NYPD interview; Police Commissioner, in upgrading the penalty to include suspension days and probation, noted that officer's "uncooperative behavior, combined with his vague and non-responsive answers during a PG 206-13 hearing were outrageous"), aff'd sub nom. Matter of Vincent v. Kelly, 126 A.D.3d 414 (1st Dept. 2015) (findings of fact affirmed and penalty not shocking to Court's sense of fairness).

The officer from whom Crouch confiscated the original notebook (Tr. was charged with making misleading statements during an official interview, and negotiated a penalty of just 15 vacation days. There, however, it was not alleged that this officer actually wrote in the notebook – he denied that he was reading it and said he did not know the identities of various nicknames. See *Case No. 2014-11250* (Apr. 15, 2016). Respondent, however, refused to provide straightforward answers when it was blatantly apparent that he was very involved with both notebooks. Further, Respondent was deemed to have been untruthful and evasive in a second Department interview about a completely unrelated matter.

In sum, Respondent has demonstrated a penchant for inattentiveness and disinterest in real police work, plus untruthfulness when confronted with his misconduct. It is imperative that his future conduct be monitored. The Department's recommended penalty is fair and adequately addresses Respondent's misconduct over two separate incidents and two separate Department interviews. Accordingly, the tribunal recommends that Respondent be ***DISMISSED*** from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Administrative Code § 14-115 (d), during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. The Court further recommends that Respondent forfeit 40 vacation days.

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

OCT 20 2016

JAMES P. O'NEILL
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MICHAEL BIRCH
TAX REGISTRY NO. 925053
DISCIPLINARY CASE NO. 2014-11252 & 2014-12721

Respondent was appointed to the Department on March 10, 2000. His last three annual evaluations were 3.0 overall ratings of "Competent" in 2012, 2013 and 2014. Respondent was placed on Level 2 Performance Monitoring on October 8, 2012, for having two below-standard evaluations. That monitoring remains ongoing.

In his sixteen years of service, Respondent has reported sick on [redacted]

Respondent has no prior disciplinary history.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials